No. 619

In the Supreme Court of the United States

OCTOBER TERM, 1942

LOUIS CAPONE,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S SUPPLEMENTAL BRIEF

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OPINIONS BELOW

The trial court's charge to the jury appears at R. 3871-3931. Otherwise, the County Court of Kings County of the State of New York wrote no opinion.

The opinions of the Court of Appeals of the State of New York (the State court of last resort) appear at R. 4030-4091 and are officially reported in 289 N. Y. 181. The Per Curiam Opinion of that court denying the motion for reargument is reported officially, 289 N. Y. 244.

JURISDICTION

The jurisdiction of this court is invoked under Section 344 (b), Title 28, U.S.C. (§237 of the Judicial Code, as amended).*

The judgment of the County Court of Kings County of the State of New York, entered on December 2, 1941, as affirmed by the Court of Appeals, by order dated October 30, 1942, is a final judgment not further appealable

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*Appendix, *infra*, pp. 23, 24.

in any court of the State of New York. The federal question herein presented and urged is based on the denial to petitioner of his rights to due process of law as guaranteed by the Fourteenth Amendment of the Constitution of the United States.* This question was raised and passed upon in the courts below (R. 36-7; 42-3; 4098).

The petition for a writ of certiorari was filed in this court on January 4, 1943, and was denied by order filed on February 15, 1943. A petition for a rehearing was filed on March 10, 1943. On March 15, 1943, by order filed, the petition for a rehearing was granted, the order denying certiorari was vacated and the petition for a writ of certiorari to the County Court of Kings County, State of New York was granted.

STATEMENT

Petitioner was indicted in May, 1940, by the Kings County Grand Jury, New York State. Soon thereafter petitioner was in custody, as were all of the prosecution witnesses who testified to matters allegedly concerning him. There was no apparent valid reason for any delay of his trial and, at that time, the State of New York could have accorded him a fair one. Instead, petitioner was held in custody for a period of sixteen months before the case was actually moved for trial. In the interim, and immediately following the finding of the indictment, numerous newspaper articles appeared, most of them condemning petitioner's co-defendant Buchalter as a czar of crime and alleging him guilty of the murder in the instant matter as well as many others, and at the same time idolizing the District Attorney of Kings County who was being groomed as the Democratic candidate for Mayor of the City of New York.

A statement of the entire case (pp. 2-35, main brief),

*Appendix, *infra*, p. 23.

including the adverse newspaper propaganda; the voir dire examination of the talesmen; the physical trappings of the trial; the conduct of the trial judge; the conduct of the prosecutor, and the court's charge, is contained in the main brief of all petitioners.

The record of the testimony is voluminous. Comparatively little of it sought to involve this petitioner. The mass of it so colored the trial and so constantly prejudiced the rights of this petitioner as to prevent a fair and impartial consideration by the jury of the evidence, and deny to him the due process guaranteed by the Constitution.

PEOPLE'S THEORY OF THE ALLEGED MOTIVE

The contentions of the prosecution were that through the manipulations of defendant Buchalter, Rosen had been forced out of a partnership in a clothing trucking business; Rosen bruited it about in the clothing market that Buchalter had forced him out of business; because of Rosen's complaints in the industry Buchalter obtained a job for him with a trucking concern, which lasted a short time; efforts by Rosen to obtain another position failed; Rosen then opened a candy store at 725 Sutter Avenue, but still vociferously complained about what Buchalter had allegedly done to him and threatened to go to Thomas E. Dewey, Special Prosecutor appointed by the Governor to investigate racketeering, and inform; Buchalter, through an intermediary, attempted to silence Rosen by giving him money to leave town; Rosen left town, but returned in a few days and again threatened to appear as a witness before Dewey; and that Buchalter, exasperated at Rosen's continued threats, ordered his execution to silence him forever (R. 234-9). This petitioner was not connected or involved in any of the foregoing. However, all such evidence as to alleged motive,

even though concededly not applicable to petitioner, was of such prejudicial character that it indubitably affected the jury's consideration as to him.

Proof in attempted substantiation of the motive, the events leading up to the commission of the crime and its eventual execution was presented through the witnesses Max Rubin, Paul Berger and Sol Bernstein; Tannenbaum and Magoon supplied alleged corroboratory admissions. Of these five persons only Bernstein and Magoon sought to implicate this petitioner.

BERNSTEIN'S IMPLICATION OF PETITIONER

Bernstein's* direct testimony, succinctly digested, follows: Two days before the murder, in the presence of this petitioner, one Strauss instructed him to steal an automobile (R. 702-3), and to return on the following day (R. 703); he returned at the appointed time and he and petitioner then drove this automobile over a certain route pointed out by petitioner, and which he instructed Bernstein to follow to make the "get-away" after a murder had been committed in a designated candy store (R. 715-6); on the following day he met co-petitioner Weiss and others (but not petitioner) and the murder was committed; Bernstein then drove the stolen automobile over the "get-away" route, at the termination of which he abandoned the stolen automobile and was met by the petitioner and co-defendant Cohen, who were awaiting their arrival with automobiles (R. 732-751).

On cross examination, innumerable falsehoods, admitted perjuries, inconsistencies and discrepancies of vital importance were developed and coolly and unconcernedly admitted by Bernstein, to such an extent that it would

* His vicious background is set forth in the petition for certiorari (p. 25-27).

be an outrageous miscarriage of justice to execute a man on such testimony, for in the final analysis petitioner's guilt or innocence depends on Bernstein's word. In fact, though Bernstein stoutly maintained that since he surrendered to District Attorney O'Dwyer in April of 1940 he had told the truth, he admitted that since that time he testified falsely in a prior first degree murder trial, knowing he "was doing wrong" (R. 797-8).*

Summarizing in the words of Judge Loughran (R. 4079):

> "The testimony of Bernstein is all-important. He was the chief of the prosecution witnesses.
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> • • • •
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> • • • At his own word, Bernstein is a long-time professional criminal. As we shall see in a moment, he is a former perjurer who perversely and flagrantly lied (fol. 4068) again to the jury on this present trial. By the doubtful testimony of a witness of such low moral fibre, uncertainty concerning the guilt of the defendants is produced • • •."

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* The full extent of these perjuries were fully set forth in the petition and brief submitted on the application for a writ of certiorari (pp. 43-54).

MAGOON'S ALLEGED CORROBORATION*

His direct testimony follows: In April, 1939, (two and a half years after the murder) he spoke to petitioner with reference to a man named Friedman (R. 2466-7). Petitioner was asked by him whether he thought it advisable that he (Magoon) work on the Friedman thing, as Magoon had hung out about a block away and thought he might be recognized (R. 2460-1). At this point Magoon stated that this was *all of the question* he asked of petitioner (R. 2461) and was immediately excused from the court room while a lengthy discussion ensued between counsel and the court, in the absence of the jury (R. 2461-9). After an appreciable length of time, Magoon returned to the stand. He was thereupon asked the following question (R. 2469):

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* As Judge Loughran said (R. 4082-3):

"(6) The sole support for Bernstein's accomplice-story against Capone was the People's witness Magoon. It was said by Magoon that Capone had made to him an oral utterance in these words: 'I worked on the Rosen thing and it was right on Sutter Avenue and I was not made.' In the declared opinion of the trial judge, the statement so reported by Magoon was 'too indefinite' to be used as a confession of guilt on the part of Capone. At the same time, however, the judge directed the jury that Magoon's testimony (if credited) could be taken as corroborative evidence tending to connect Capone with the murder of Rosen. This was a controlling ruling. Belief in the actuality of Capone's oral admission as reported by Magoon was an indispensable condition of the finding of Capone's guilt. Hence the affirmance of these judgments of conviction must bespeak the conclusion of the court that the testimony of Magoon is not an altogether insufficient ground for the signing of the death warrant of Capone. See PEOPLE v. CRUM, 272 N. Y. 348.) On this angle of the case we have felt—and still feel—no little concern.

A testimonial report of an oral admission of a party-litigant is generally the most dangerous evidence that can be received in a court of justice, and the most liable to abuse. LAW v. MERRILLS, 6 Wend. 268, 277.) Even when the admission is reported by a reputable witness, the testimony is often the weakest and most unsatisfactory of all the kinds of evidence. (See the authorities set forth in 7 Wigmore on Evidence, (3rd ed.) § 2094, p. 468.)"

> "After you asked him that question, did he say anything to you? Did he, Capone, say anything to you"?

Despite his complete answer given before recess, he now irresponsively interpolated as follows (R. 2469):

> "I have not finished my answer on that."

and thereupon added (R. 2469):

> "I says, 'I hung out about a block away and *it is sort of off Sutter Avenue.*'" (Italics ours.)

To this petitioner replied, "What are you worried about? I worked on the Rosen thing and it was right on Sutter Avenue and I was not made." Magoon then replied that he was not worried; he was just asking advice (R. 2469).

In the fall of 1938, two years after the murder, in the presence of petitioner, he had been instructed to follow Rubin, ostensibly to assassinate him (R. 2434-53). At a later date there was a conversation with reference to Rubin at which petitioner and others were present and at which petitioner merely stated "that Rubin is hurting Lep, and we got to hit him in the head and get rid of him" (R. 2453-4). Magoon subsequently reported that Rubin had a police bodyguard, and his task immediately terminated (R. 2456-8). Parenthetically, it should be noted that the motivating reason for what the trial court called "the attempted assasination of Rubin" was in no manner connected with the Rosen murder.

That, in brief, constitutes all of Magoon's testimony concerning petitioner, except the development on cross examination of the circumstances under which he allegedly disclosed the above information to the District Attorney.

In May, 1940, just as he completed a term for vagrancy, he was lodged in a hotel in the Bronx (R. 2532-4), where

he spoke with District Attorney Foley of that County (R. 2536), but did not mention anything about the Rosen case (R. 2539-40), nor was he asked, nor did he volunteer anything to the Bronx officials about Rosen at any time thereafter (R. 2546).

Approximately two days after his first conversation with Mr. Foley, he spoke with Mr. O'Dwyer, but did not mention anything about the Rosen case (R. 2542-3). A couple of months later (in July) he was taken to the Brooklyn District Attorneys' office and again questioned but was not asked about the Rosen case nor did he volunteer anything about it (R. 2544, 2546-7, 2550). While being questioned somebody was writing—he does not know whether it was a stenographer (R. 2547-8). He signed many papers which contained the substance of his questioning by District Attorney O'Dwyer (R. 2550-1). The defense called upon the district attorney to produce these statements, but the prosecutor, after equivocating on two occasions, that he was "quite certain" that none existed, finally stated there was no such statement (R. 2549, 2559).*

It is significant to note that the first time he ever mentioned anything about the Rosen case (R. 2554) was some time between January and June, 1941 (about seven months to a year after being taken into custody), although previously questioned by the Brooklyn District Attorney's office more than twelve times (R. 2552-3).**

Little credence, if any, can be given to this self-con-

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* Magoon either deliberately falsified about signing statements, or the failure of the District Attorney to produce them is a strong indication that they would have been beneficial to the defense; and would constitute a suppression of evidence. For other instance of suppression see main brief (pp. 54-59).

** This testimony should be compared with that of Bernstein and Lamenbaum, both of whom testified they were questioned about the Rosen case early in 1940 (R. 1185, 2335-7).

fessed murderer who successfully evaded the law since a boy attending public school but protested that he never told anything but "little white lies." and maintained strict silence as to his alleged knowledge of Rosen's murder for more than seven months after his arrest. As Judge Loughran said (R. 4083):

> "Magoon was not a reputable witness. He is a self-confessed murderer. His appearance on the witness stand had no object but the saving of his own skin. There is thus grave question whether the above word of Magoon standing alone can in good conscience be accepted as a sufficient prop for what (as we are about to see) was a revision by Bernstein of his original evidence against Capone."

ALLIE TANNENBAUM

He was the only other witness to mention petitioner's name. According to Magoon, who knew him since 1933 or 1934, Tannenbaum was a member of the so-called "Combination," and was seen by him frequently during the years 1933, 1934 and 1935, at the "corner" of Saratoga and Livonia Avenues, Brooklyn (R. 2525-6). Tannenbaum and principal witness Bernstein, in 1937 or 1938, together, transported Yuran's dead body in a truck in the mountains (R. 1087, 2228). Tannenbaum and witness Magoon were together in the Friedman murder (R. 2229, 2414-5).

The sole reason for mentioning Tannenbaum is his admission, when questioned by the prosecutor, that although present at a number of conversations with reference to the Rosen murder, he at no time heard petitioner's name in connection therewith. In fact, he had never seen or

heard of this petitioner "until the year 1938"—over two years subsequent to the Rosen murder (R. 2254).*

Despite the voluminous record—the testimony of thirty-six witnesses and the introduction of fifty-seven exhibits (none of which exhibits directly affected petitioner)—tersely summarized, the People's proof against petitioner consisted solely of the testimony of the self-confessed liar accomplice Bernstein and the criminal Magoon, who furnished the alleged corroboration consisting of a supposed conversation had more than two and a half years after the occurrence.

As to the complete proof presented against petitioner, the trial court admitted (R. 3918): "In mentioning the points of evidence applicable to this defendant, Capone, I particularly wish to impress upon the comparative paucity of the corroboration from non-accomplice witnesses." Judge Rippey of the New York Court of Appeals was of the opinion that (R. 4091): "There was insufficient legal evidence at the close of the People's case upon which to base a conviction of Capone and the indictment against him should have been dismissed." Judge Loughran, one of the dissenting judges, stated (R. 4085): "There is thus grave question whether the above word of Magoon standing alone can in good conscience be accepted as a sufficient prop for what (as we are about to see) was a revision by Bernstein of his original evidence against Capone"; and further, (referring to Bernstein) (R. 4085), "No one can be sure the verdict against Capone was not the result of an undue restriction of his essential right so to test the credibility of that testi-

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* Bernstein and Magoon alleged that petitioner was a leading member of the so-called "Combination." If so, Tannenbaum would certainly have known him. His testimony completely destroyed whatever doubt may be left as to the falsity of Bernstein's and Magoon's testimony regarding petitioner's alleged participation in the crime.

mony." His opinion was concurred in by Judge Desmond. Chief Judge Lehman, one of the affirming judges, stated (R. 4078): "Evidence coming from a polluted source has failed to remove reasonable doubt of the defendants' guilt from my mind." Even in the prevailing opinion of Judge Conway, concurred in by Judges Finch and Lewis, it was stated (R. 4069): "The guilt of the defendants Buchalter and Weiss was clearly established. The guilt of the defendant Capone depended upon whether the jurors believes the testimony of a witness who corroborated the accomplices. That witness was a criminal."

SPECIFICATION OF ERRORS TO BE URGED

Petitioner urges that error was committed to his manifest prejudice in the proceedings below whereby he was deprived of due process of law in that:

I. The trial was held in a poisoned atmosphere and a fair and impartial jury could not be and was not obtained, and a fair trial could not be and was not had. The jury was improperly impanelled. In a situation where the prejudice against petitioner was bound to affect the jurors, the physical trappings of the trial were such as to amplify and vitalize that prejudice.

II. The Court of Appeals should have reviewed the action of the Trial Court which prevented the impanelling of an impartial jury by its rulings upon challenges for actual bias. The right to such review was not waived by petitioner's consent to be tried before a "special jury." The rulings of the Trial Court prevented the impanelling of a fair and impartial jury; and an impartial jury is essential to due process of law. In this case the State of New York failed to supply a corrective process for this denial of due process.

III. Evidence material and relevant to the defense, in the possession of the prosecution, was suppressed by the State. Petitioner was thus deprived of a fair opportunity to present his defense. He was likewise deprived of an opportunity of adducing proof that evidence offered by the prosecution was in fact perjurious.

IV. The Trial Court's usurpation of the province of the jury by the resolution of issues of fact against petitioner in its charge to the jury as well as by comments during the course of the trial, and the summation of the prosecutor wherein, among other unprofessional things, he made improper promises to the jury concerning the future treatment of confessed criminals who had testified for the prosecution, and wherein he purported to give testimony, all combined to deprive petitioner of the right to fundamental fairness in the trial.

V. The denial of petitioner's numerous motions for a severance of his trial amounted to a forfeiture of his rights to a fair and impartial consideration of the evidence against him.

ARGUMENT

The minimal requirements of the constitutional guarantee of due process of law are fully discussed in the main brief (pp. 37-41).

The first four specifications of error, as applied to all petitioners, are likewise discussed therein (pp. 39-75). Additional factors affected this petitioner's rights, utterly depriving him of a semblance of due process, viz:

THE JURY

Two of the jurymen, Rorke and Links (See main brief, pp. 24-26), had been examined as talesmen in a prior murder trial (*People* v. *Maione and Abbandondo*) in which counsel for this petitioner had appeared as counsel for Maione and the People were there represented by the same prosecutor as herein. Both jurors had then heard petitioner's name mentioned, as well as that of many others, and had followed the verdict in the previous case. Rorke had been peremptorily challenged by the defense, and Links by the prosecutor, who had then felt that Links could not be a fair juror by reason of his connection with a radio program known as "Mr. District Attorney." All defense peremptory challenges had been exhausted at the time these two persons were permitted to remain on this jury.

Having succeeded in seating these two men on the jury, the prosecutor, with the consent of the court, was permitted to adduce testimony, wholly unconnected with the issue, to the effect that this petitioner had been associated with Maione and Abbandando and numerous other persons (R. 698-699; Magoon, R-2423-5; Tannenbaum, R. 2234-6).

Whether the court and prosecutor purposely permitted this irrelevant prejudicial testimony to be introduced, or not, is immaterial. The fact remains that Rorke and Links had prior knowledge of the persons so named, and of their execution for crime.

Coupled with the argument advanced in the main brief, there remains little question that Rorke and Links were in no position (consciously or unconsciously) to accord to petitioner the fair and impartial consideration of the evidence as guaranteed by the Constitution.

THE PROSECUTOR'S SUMMATION

Serious as were the prosecutor's derelictions against all petitioners throughout the trial,* his summation reached the zenith of impropriety against this petitioner particularly when, among other things, he unjustly characterized petitioner's counsel as "the canniest, the wiliest of lawyers" (R. 3810, 3855), "a great detective" (R. 3830) and a "mental juggler" (R. 3836), and further charged that the summation of petitioner's counsel was a "pay off" to co-petitioners (R. 3839-40):

> "Because one counsel sits at one table and the other at another table, is that a separation of these three? Let me show you how each one of the defenses were put in, and then you can consider the summation of Mr. Rosenthal and see if he did not pay back for what Lepke and Mendy did for Capone in the defense."

Condemning petitioner's counsel on the one hand, he wrongfully sought to influence the jury by self-praise (R. 3821):

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* Discussed in main brief. A glaring example (not therein discussed) occurred during Rubin's testimony. He was asked whether he had ever seen petitioner before and replied that he had in the year 1932 or 1933. He was not introduced to him nor does he know where he saw him, but remembers he was in the company of Buchalter (R. 1461-2). [Admittedly, this occasion had no connection with this case (R. 1752).] The prosecutor was not satisfied with this reply and asked who else was present and thereupon received the reply that one "Buggsy" Goldstein was there at the time (R. 1462). He also had a fleeting glance of the petitioner in 1935 (R. 1463), but not in connection with this case (R. 1752). These were the only mentions of petitioner's name by Rubin throughout his testimony. As the incidents recited and the presence of Buggsy Goldstein had no relevancy to this case, the prosecutor could have had no reason to introduced this testimony except to prejudice the jurors' minds by recalling to them a notorious case which they must have read about resulting in the execution of said Goldstein (PEOPLE v. GOLDSTEIN, 285 N. Y. 376), thus further carrying out his persistent efforts to have the case tried on newspaper gang stories rather than the indictment.

> "I say to you with all due solemnity, that nothing I have ever learned as a public prosecutor, no talent that I now enjoy, would ever be used in any way *with any of you* to make *you* feel that I had discredited *you* or myself or any member of the public." (Italics supplied.)

THE JUDGE'S CHARGE

Whatever semblance of a trial remained after the prosecutor completed his inflammatory summation characterizing this petitioner and his counsel, was completely destroyed by the court's unfair charge, a substantial portion of which was devoted to neutralizing the effect upon the jury of counsel's cross examination and summation dealing with Bernstein and Magoon (on whom rested the entire case against this petitioner).

Having first charged that "direct examination goes right to the point, and cross examination * * * is largely hit or miss" (R. 3903), the Court proceeded to destroy the argument regarding the letters (offered as evidence of opportunity to concoct a story) which Bernstein was forced to admit he sent while in custody. In that respect the Court charged, in substance, that the jury must accept as a fact that police surveillance prevented concoction, for its lack, even though no proof had been offered to substantiate Bernstein, would be "sloppy police work" (R. 3956).

In the portion of the charge referring to Magoon, the court emphasized his (Magoon's) testimony because of the "great importance of this feature of the case" by reading all the direct testimony on the particular subject (R. 3921-2). The court said (R. 3926):

> "Gentlemen, I think that is the text applicable thereto, unless there was something on cross examination applying to it."

No mention was subsequently made of any part of the cross examination, except to disparage its worth and discount counsel's analysis in summation.

The court's attack on the summation of petitioner's counsel as to the legitimate inferences which could be drawn from Magoon's claim that he only told "little white lies" was to the effect that the judge did not want the jury to be misled by counsel's summation, as the reasoning was "childish," and "should not affect intelligent men whose minds are mature" (R. 3898-9).*

Throughout summation petitioner's counsel referred to and drew legitimate inferences from the stock answer of prosecution witnesses when confronted with previous contradictory testimony: "if it is in the book, it is so." The court nullified the effect of this cross examination and summation by charging that it would be an "unholy thing" to expect a witness to remember his previous testimony, and that it was a normal response for a witness to reply: "If it is in the book, it is so" (R. 3894).

Petitioner never stood one iota of a chance to have his fate properly determined despite "the paucity of the evidence" when we analyze the court's charge and note the deft manner in which the effect of cross examination and summation was destroyed. The jury was prevented from exercising its free will in judging the contradictions in the testimony of Bernstein and Magoon. Unquestionably, the court must have concluded that the cross examination of these witnesses, and the summation with respect to them, had a telling effect upon the jury, which the prosecutor's summation had failed to dispel. To rectify this omission, "the charge took on the character of a summation for the People" (R. 4087) and was tantamount to a direction of a verdict of guilty against this petitioner.

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* See main brief for court's entire statement (p. 35)

SPECIFICATION OF ERROR V

Research fails to disclose a situation similar to the instant case. If the failure to grant the severance did not amount to a forfeiture of petitioner's rights to a fair and impartial trial, we doubt whether a deprivation of due process for that reason can arise within the annals of criminal law.

Prior to the trial (June 5, 1941), a motion for a severance was made (R. 31-54),* and denied without prejudice to renewal before the trial court (R. 29-30). This motion was orally renewed on additional papers before the trial court on August 4, 1941 (V. 21;** R. 55-64) and denied (V. 29). On September 15, 1941, on the consent of the prosecutor, a severance was granted against defendant Farvel Cohen (V. 47),*** but denied as to petitioner (V. 47). At intervals throughout the trial similar motions were repeated.****

Prior to the commencement of the trial it became obvious that regardless of the lack of evidence against petitioner, his conviction was a foregone conclusion if he were compelled to stand trial with the co-petitioners, because of the intense prejudice which was rampant against them. The petitioners were all deprived of a fair and impartial trial by reason of the inordinate amount of lurid inflammatory newspaper publicity which preconditioned the community to think of them as guilty men. The greater

*It was urged in that motion that the failure to grant a severance would be a violation of petitioner's constitutional rights (R. 39-7); and the prosecutor admitted in his brief in opposition to the petition for a writ of certiorari that the constitutional question was thus raised (See prosecutor's brief, p. 37).

**V. refers to printed record of *voir dire* examination.

***Previously denied by trial court on August 4, 1941 (V. 29).

****S. testimony of Berger (R. 2191), Tannenbaum (R. 2240), Rubin (R. 2577), Aman (R. 2685), Pell (R. 2698), Ryan (R. 2703), Winne (R. 2706), end of people's case (R. 2715), end of entire case (R. 3541), and of sentence (R. 3896).

part of this publicity was directed against petitioner Buchalter. That it, nevertheless, prejudiced petitioner cannot be gainsaid. Thus was petitioner saddled with a burdensome handicap which prevented a fair consideration of the evidence presented, uncolored by whatever prejudice existed against co-petitioners.

A casual examination of the *voir dire* discloses that the thirty peremptory challenges accorded defense collectively were exhausted because a majority of the talesmen had read about one or the other of the co-petitioners.

Under §360 of the Code of Criminal Procedure of the State of New York* this petitioner was unable to exercise his free choice but was compelled to join therein. Thus were all thirty peremptory challenges exhausted. The injustice to petitioner thereupon became apparent. The jurors Rorke and Links were then seated in the box.** Petitioner's hands were tied. The court refused to excuse these men. For the first time the necessity for petitioner to exercise a peremptory challenge arose, to no avail. The denial of the severance was the direct cause of this condition and unquestionably prevented a fair consideration of the evidence.*** Thus the trial began.

For weeks a parade of witnesses testified about prejudicial matters which must necessarily have been excluded had petitioner been granted a severance.

Rubin was permitted to trace the leadership and internal affairs of the Amalgamated Clothing Workers Union since 1923 and to name certain individuals who had either disappeared or were dead and, without official connection, were on the union's "payroll" (R. 1293-1320). These persons and events were not even remotely connected with the case, nor was it claimed that petitioner had any con-

* See appendix, p. 24

** For discussion see p. 13 supra

*** See discussion p. 17 supra

nection with the activities disclosed, or had any knowledge of or connection with the persons named.* He further recounted his peregrinations in order to avoid the investigation of Special District Attorney Thomas E. Dewey, but in nowise implicated this petitioner.

Rubin testified he had been shot in the head by an unknown person (R. 2373). This inflammatory testimony, although admittedly inapplicable to petitioner (R. 3917), and inadmissible in a separate trial, nevertheless, must have prejudiced his rights. Summarizing, Rubin could not have properly testified as a witness had a severance been granted.

Berger similarly traced the affairs of the Clothing Union since 1929 and named men unconnected with this case who were obviously gangsters. He, likewise, would not have been a competent witness against petitioner.

A portion of the testimony of Magoon regarding his "tailing" of Rubin could not have been properly elicited had petitioner been granted a severance.

Mrs. Rosen (R. 246-256), Harold Rosen (R. 466-483), and Sylvia Greenspan (R. 567-584), were in nowise connected with the petitioner. The flight of Rubin and the alleged flights of Buchalter (charged as not connected with this case) and Weiss were extremely prejudicial to petitioner, although not admissible if he were on trial alone.*

* It is obvious that it was the prosecutor's purpose to cover the entire trial with an aura of union gangsterism and thereby subtly affect the jurors' deliberations by recalling to their minds all the lurid newspaper accounts of past years relative to gang killings and depredations.

* See testimony of Rubin (R. 1381-1420, 1685-1700 et seq.), Maguire (R. 1761), Berger (R. 1814-25 et seq.) Aman (R. 2607-86), Pell (R. 2687-), Ryan (R. 2699-2703), Winne (R. 2704-06), Malone (R. 3493-3508), Whelan (R. 3509-17), and Newman (R. 3518-25), also People's exhibits [illegible] 33 to 37 inclusive.

Thus as the evidence unfolded, the People's proof, if believed, tended to show that the persons allegedly involved in this crime had some connection with union activities, *but not petitioner*; that Rubin, Bernstein, Strauss, Reles, Goldstein, Magoon, Tannenbaum, Cohen and others had left town, *but not petitioner*; nor was there any proof that petitioner's name had been mentioned by anyone to either Rubin, Berger or Tannenbaum. Moreover, although the prosecutor cross-examined practically all of co-petitioner's witnesses as to whether they were acquainted with various named persons, including the other petitioner, no inquiry was made as to this petitioner.

Further serious prejudice resulted during the summation. Counsel for co-petitioner Buchalter admitted he was serving a long prison sentence* and condemned Buchalter's past activities and the vicious circle domineering the unions (R. 3546-7). These facts could not have been disclosed in a separate trial, but after the conclusion of petitioner's counsel's summation, the prosecutor dwelt upon the statement of Buchalter's counsel and designated Buchalter as "the czar of the industrial rackets with a half a million dollar take" (R. 3783, 3801).

The recitation above constitutes some of the major happenings which could not have permeated the atmosphere were petitioner on trial alone. The legal evidence against petitioner was insufficient (R. 4090-1). Thus, the numerous errors committed, plus the inapplicable prejudicial evidence admitted because of a joint trial were of such a nature that the jury must have been unduly influenced to such a degree that it could not enter upon a free and open deliberation of the evidence presented against this petitioner.

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* The jury's attention was also called to this fact at the commencement of the trial (V 282).

CONCLUSION

The jurisdiction of this court is invoked by reason of the denial to petitioner of his constitutional rights to a fair trial as guaranteed to him by the Fourteenth Amendment of the Constitution of the United States.

> "As applied to a criminal trial, denial of due process is the failure to observe that fundamental fairness essential to the very concept of justice. In order to declare a denial of it we must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevent a fair trial." *Lisenba* v. *California*, 314 U. S. 219, 236.

It is respectfully submitted that the judgment of conviction herein was not obtained by due process of law, that it resulted from the mere pretense or semblance of a trial by reason of the prejudicial and inflammatory newspaper publicity directed against the petitioners prior to the trial; the failure to grant this petitioner a separate trial; the atmosphere in the courtroom and the conduct of the trial; the seating of a prejudiced and biased jury; the conduct of the trial judge; and the misconduct of the prosecutor, condoned and permitted by the trial court. This was as much a denial of due process of law as the domination of a court by mob violence, since in such case, while there is the form of a hearing, a hearing in substance, is denied.

> *Moore* v. *Dempsey*, 261 U. S. 86;
> *Norris* v. *Alabama*, 294 U. S. 587.

Four of the seven judges in the Court of Appeals remained unconvinced of petitioners' guilt. Three expressed firm belief that the judgment of death should be reversed because these petitioners did not have a fair chance to defend their lives.

> "*Whether a guilty man goes free or not is a small matter compared with the maintenance of principles which still safeguard a person accused of crime*" (*People* v. *Barbato*, 254 N. Y. 170, 178). (italics supplied.)
>
> "Not the least merit of our constitutional system is that its safeguards extend to all—the least deserving as well as the most virtuous." *Hill* v. *Texas*, 316 U. S. 400, 406.

Here fundamental fairness was sacrificed; form alone was preserved. This judgment cannot stand unless the concept of due process be aborted.

Respectfully submitted,

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Of Counsel.

APPENDIX

The relevant portions of constitutional and statutory provisions to which reference is made in the foregoing brief:

Constitution of the United States

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Judicial Code of the United States

TITLE 28, U. S. C., SECTION 344 (SECTION 237 OF THE JUDICIAL CODE, AS AMENDED).

(b) It shall be competent for the Supreme Court, by certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where is drawn in question the validity of a treaty or statute of the United States; or where is drawn in question the validity of a statute of any State on the ground of its being repugnant to the Constitution, treaties, or laws of the United States; or where any title,

right, privilege, or immunity is specially set up or claimed by either party under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States; and the power to review under this paragraph may be exercised as well where the Federal claim is sustained as where it is denied. Nothing in this paragraph shall be construed to limit or detract from the right to a review on a writ of error in a case where such a right is conferred by the preceding paragraph; nor shall the fact that a review on a writ of error might be obtained under the preceding paragraph be an obstacle to granting a review on certiorari under this paragraph.

New York State Code of Criminal Procedure, § 360

When several defendants are tried together they cannot sever their challenges, but must join therein.